ACTUAL PROBLEMS OF REALIZATION OF THE RIGHT OF PERSONAL PROTECTION OF THE ACCUSED IN THE CONTEXT OF THE REQUIREMENT FOR A TERM FOR PRE-TRIAL INVESTIGATION ACCORDING TO THE BULGARIAN CRIMINAL PROCEDURE CODE

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Abstract

The present scientific publication represents an attempt for clarification the question, how affects the principle of objective truth and the right of personal protection of the accused person to carry out the pre-trial investigation in an explicity regulated by law period of time? For this purpose, is made an obserbance of Art.234, par.7 of the Criminal Procedure Code of the Republic of Bulgaria and the legal consequences. Based on the understanding that the defendant's right to personal protection is in its broadest sense, a recognized and guaranteed opportunity for personal, active participation in criminal proceedings we have mainly dealt with the issue of excluding important evidence of justification only because they were collected beyond the period of investigation and over the forms of limiting the personal activity of the accused person in the preliminary stage of trial through the investigation period itself. In the context of the problems described, a case- law of the European Court of Human rights has also been discussed. In the final part of the report are made theoretical conclusions on the basis of which were formulated proposals for improvement of the Bulgarian Code of Criminal Procedure.

Keywords: *right of personal protection, criminal procedure law, European court of Human right, case-law.*

1. Introduction

The ground for this paper is the latest amendments made 2017 in Art. 234 of the Criminal Procedure Code of Republic of Bulgaria. With these amendments, the legislator finally strengthened his understanding of conducting the pre-trial investigation in absolute term. In my opinion, this normative innovation inadvertently contradicts the disclosure of objective truth and the right to personal protection, which is linked to the requirement for the duration of the study in several different directions: personal protection is exercised at all stages of the process (Art. 122 par. 1 from the Constitution of Republic of Bulgaria; Article 15 of Criminal Procedure Code of Republic of Bulgaria); the accused as a rule presents and is involved in the pre-trial investigation (Art. 206 of the Criminal Procedure Code); the accused has the opportunity to make evidential requests and to lay evidence in the course of the investigation (Art.55, 107 and 230 of the Criminal Procedure Code); the accused has the right to a sufficient time to prepare for his defense (Art. 6 (3) (b) ECHR). The present exposition describes this problem and offers a solution.

2. Content

According to the amended Art. 234, par. 1 of the Criminal Procedure Code "The

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investigation shall be performed and the case forwarded to the prosecutor within two months from the date of its institution."

In par. 2 of the same article is expressly prescribed the possibility of shortening the basic term for investigation by the prosecutor by defining shorter than the two-month period, and in par. 3 - possibility of extending the term under par. 1 in the factual and legal complexity of the case by up to four months, in cases where it can be assumed that the extended term is also insufficient, the administrative head of the respective prosecutor's office or a prosecutor authorized by him may extend the extended term at the request of supervising prosecutor, and the period of any extension may not be longer than two months. In paragraph 4 of Art. 234 of the Criminal Procedure Code, it is stated in particular that " The reasoned request for prolongation of the period shall be sent before expiration of the terms under Par. 1 and 2. Consequently, the timely completion of the pre-trial phase of the process is legally secured, above all with the introduction of a preliminary pre-trial investigation.

The investigating authorities must, as a general rule, clarify the facts and circumstances of the criminal proceedings within the prescribed time limit, and only exceptionally, for a shorter or longer term but always in a clearly specified time, unlike the court which Art. 22, par. 1 of the Criminal Procedure Code empowers the general obligation to consider and resolve the cases within a reasonable time. This dual mode of development and completion of criminal proceedings inevitably leads to a number of both theoretical and practical problems.

It is not clear from the law itself why the court at the stage of a judicial investigation should not be stimulated and accordingly limited in its actions by a deliberate time limit, and the pre-trial authorities must. Although in substance, the investigation activity is identical and with the same procedural importance for the entire criminal process - a concrete act of revealing the objective truth by getting to know the issues relevant to the proper resolution of the case. The described ambiguity is exacerbated when the possibilities for disclosure of the objective truth of the court are compared with those of the investigating police authorities and the investigators who ex lege are obliged in the pre-trial phase of the trial to conduct a full, objective and comprehensive study within the two-month period because the extension and the shortening of the investigation period is not a mandatory one, but only a discretionary option, and secondly an opportunity addressed to the prosecutor, i.e. lies beyond their own discretion and authority - argument Art. 234, par. 2-3 Criminal Procedure Code. In other words, there is no answer to the question why the same criminal case at the pre-trial stage is considered according to the legislator's preliminary assessment of a sufficient time for its solution, and in the court - according to the court's decision, for a reasonable time?! It can be summarized that the pre-trial investigation "ipso iure" should take place and the case should be handed over to the prosecutor within two months of its formation in accordance with Art. 234, par. 1 of Criminal Procedure Code, as "de lege lata" conducting the preliminary investigation within the terms of par. 2-3 of the same article, constitutes an optional deviation from the general text (Article 234, paragraph 1 of the Criminal Procedure Code), i.e. an exception to the general rule and not the basic rule itself. The latest amendments from 2017 in Criminal Procedure Code do not contradict this conclusion. Although, in Art. 234, par. 3 of the Code states that the investigation period may be extended, i.e repeatedly and not

once, it can not be assumed that the extensions themselves can be carried out indefinitely, because, according to Art. 203 par. 2 of the Criminal Procedure Code: " The investigative body shall be obligated within the shortest possible period to collect the necessary evidence required for the discovery of the objective truth, being guided by the law, his/her inner conviction and the instructions of the prosecutor."

From the aboved, it can be safely concluded that the existence of an obligation to carry out the preliminary investigation as soon as possible necessarily implies an obligation to temporarily reveal the objective truth in the pre-trial phase of the trial. This is because the objective truth "de jure" is revealed only through a lawful investigation, that is, in the order and with the means stated in the code – argument- Article 106 of the Criminal Procedure Code. The normative introduction of a deadline for revealing the objective truth is in disharmony with Art. 121, par. 2 of the Constitution of Republic of Bulgaria, according to which: "The proceedings in the cases ensure the establishment of the truth". The constitutional legislator is categorical that all procedure, i.e pre-trial proceedings, is organized and structured in such a way as to ensure that the knowledgeable subjects can reach the objective truth in full and not as far as possible within a certain procedural timeframe. This understanding could be reached in another formally-logical way, namely, it is not possible to fulfill the tasks referred to in Art. 1 of the Criminal Procedure Code without "... establishing the facts and circumstances of the criminal process as they have been in the objective reality"[1]. For example, disclosing the offense and disclosure to the guilty is always a function of clearly illustrating the criminal event and the involvement of the accused in it. The timely discovery of objective truth violates the very principle of objective truth (Article 13 of the Criminal Procedure Code) and leads to conclusions, most of which are absolutely unacceptable:

First of all, it is clear from the obligation that the objective truth be strictly established within the pre-trial investigation period that it must be disclosed on a provisional basis - to the extent that the term has not expired, and not unconditionally, as stated in Art. 13 of the Criminal Procedure Code - with all necessary measures for the purpose.

Second, since the objective truth must be disclosed only within the period of investigation and not according to the need to examine all the circumstances relevant to the outcome of the case, it is permissible and sufficient that it be sought in part rather than in full, exhaustively.

Third, as the objective truth is revealed exclusively within the time limit and not according to the factual nature and legal complexity of the case, it is permissible to derive it entirely according to the diligence, the approach and the subjective possibilities of the investigative bodies to orientate quickly and correctly in time.

Fourth, the requirement for objective truth to be "delivered", that is brought quickly into the process, finally stimulates the investigating authorities to ignore the details of their work, which increases the risk of procedural errors and significantly reduces the quality of their work.

Fifth, the disclosure of objective truth with the judicious speed, but without the necessary quality, excludes the possibility of a proper settlement of the case.

Sixth, according to the practice - the wrongful resolution of the case always comes at the expense of citizens' rights and their trust in the justice system, etc.

From the above, it can be inferred that the disclosure of objective truth within the

[1] С. Павлов, Наказателен процес на Република България – обща част, С. "Сиби", 1996 г., с. 108.

explicitly defined time frame for pre-trial investigation is a factual and formal-legal disagreement with the lawful and proper resolution of the case. This disagreement ultimately reduces considerably the security of state interests and hence of personal interests, because ... "in our criminal proceedings, the interests of the state are harmoniously combined with the interests of the person"[2] Therefore, the timely disclosure of objective truth adversely affects the full exercise of the defendant's right of defense. Personal protection, conceived as a specific subjective right, means the possibility of self-defense of certain rights and legitimate interests in the criminal process - active participation aimed at highlighting those circumstances of the subject of proof that exclude or mitigate the penal liability of the accused i.e. disclosure of objective truth about them from the accused himself. From this point of view, personal protection always helps to properly solve the case. The introduction of a time-limit for disclosure of the objective truth in the pre-trial phase infringes the right to personal protection, so that, through its exercise, the accused reveals the truth of the factual situations in which he is using the case.

The necessity for the objective truth to be revealed exclusively within the term for pre-trial investigation is imposed in Art. 234, par. 7 of Criminal Procedure Code, with the following wording: "... Investigative actions taken outside the time limits under Paragraphs 1 - 3 shall not generate legal effect and the evidence collected may not be used before court for the issuance of a sentence." Consequently, the disclosure of the objective truth by will and by the means described in the code by both the state and the accused outside the term a pre-litigation investigation is inadmissible in nature and the person subject to it should be subject to a procedural penalty consisting in disqualification of the evidence gathered outside the due date. Although the procedural inadmissibility of evidence and evidence attracted outside the term of investigation is not a classical legal sanction, since it neither adversely affects the person of the offender by imposing certain sanctionary consequences on him (burdens, deprivation) nor his property. It is atypical procedural penalty aimed at restoring the situation existing before the offense.

By argument of legal theory, the term is relevant for a certain period of time in which legal rights are exercised and legal obligations are being fulfilled. From the point of view of its realization, it is an event, as the physical exhaustion of time occurs regardless of the presence of human will for that[3]. As an event in certain cases, the term is raised by the legislator as a particular legal fact from the category of legal events, the preliminary manifestation of which is confined to the appearance of certain legal consequences. Considered as a legal fact, the term is part of the composition of the legal phenomenon - a necessary component of it and a separate, independent precondition for the creation, modification or extinction of rights and obligations[4]. In the indicated sense the legislator in Art. 234, par. 7 of the Criminal Procedure Code treats the term of investigation. A careful analysis of the provision shows that the expiration of the investigation period is a legal fact, the manifestation of which exits the pre-emptive environment for a pre-trial investigation. In other words, the expiration of the terms under

[2] Пак там, с. 90.

[3] Р. Ташев, Обща теория на правото, С., "Сиби", 2010 г., с.235-236.

[4] Виж подробно относно строежа на равното явление, В. Ганев, Курс по обща теория на правото – увод и методология на правото, С., "Академично издателство Проф. Марин Дринов", 1995 г., с. 15-20.

par. 1-3 of Art. 234 of Criminal Procedure Code entails the obligation to suspend the investigation, the non-fulfillment of which leads to procedural sanction - the procedural inadmissibility of the collected material and the impossibility of being used by and before the court in the issuing of the sentence. But in order to be an imperative, the law is "... above all- evaluation norm"[5]. This is because "... whoever wants to motivate someone, he must know beforehand towards what he wants to motivate; he must have assessed that thing in a certain positive sense, i.e. to have found it valuable."[6] In this logical sequence, the norm of Art. 234, par. 7 of Criminal Procedure Code should also state what is the state of public law that is behind its imperative, i.e what is publicly worthwhile and what is not to occur or not to be subject to sanction. Obviously, the legislator has considered it to be publicly harmful to use evidence gathered beyond the time-limit for pre-trial investigation, i.e, it is publicly valuable to close the criminal proceedings quickly. This legislative decision can only be justified if the exclusion of evidence formally collected outside the time-limit for pre-trial investigation is in favor and not at the expense of the rights and legitimate interests of the participants in the criminal proceedings and, in particular, the accused as a subject in the pre-trial phase and in the judiciary. Simple verification of the claim that the rapid completion of criminal proceedings corresponds to the effective and efficient protection of the legal good of the accused leads to important results, some of which are considered as significant below.

First, from the literal interpretation of Art. 234, par. 7 of the Criminal Procedure Code, it is remarkable that there is no obstacle to certain justifiable evidence, that they are inappropriate and consequently used in the process, even though the request for their collection was made at the end of the term or shortly after its expiration, only on the pretext that their collection outside the same would not produce the intended legal consequences and would therefore be meaningless. This, in turn, is nothing other than depriving the defendant of free evidence valuable evidence, especially considering the fact that the taking of evidence and the collection of the materials mentioned therein takes place outside his or her personality. It is addressed to the competent state authorities as a procedural obligation (Article 107 of the Criminal Procedure Code), which can not be implemented in a timely manner, even consciously, in general. The omission of the term for unreasonable reasons is irreparable - Art. 186, par. 1 of the Criminal Procedure Code and the disciplinary sanctioning of state bodies for deliberate procedural passivity will in no way remedy the unfavorable consequences of expiry of the term for the accused.

Second, the provision mentioned above precludes the acceptance of any documentary evidence deposited personally by the accused, even when the expiration date is only one day, which is absurd and in violation of his or her effective personal protection. It goes without saying that there is no obstacle to the accused by an active subject of the investigation to be reduced to a passive object of the same by means of purely formal legal arguments.

Third, Art. 234, par. 7 of the Criminal Procedure Code makes it possible to exclude without justification the exculpatory evidence that is included outside the general investigation period by carrying out procedural investigative actions (prequisition, search, seizure, etc.).[7]

[5] Н. Долапчиев, Наказателно право – обща част, С., " Издателство на Българската академия на науките", 1944 г., с.202.

[6] Пак там.

[7] В този см., вж., М. Чинова, Досъдебното производство по НПК – теория и практика, С., "Сиела", 2013 г., с.388.

Fourth, the continuation of the term in the criminal proceedings, according to Art. 185, par. 1 of Criminal Procedure Code is only possible if it is determined by the court or pre-trial bodies in the presence of valid reasons and the filing of an application before the expiration of the term. Probably, because the time for investigation is determined by law, not by a body of pre-trial proceedings or by the court, the legislator in par. 3 of Art. 234 talks about the extension of the investigation period. It is obviously a particular case of extension of the time-limit, since there is no significant difference between the extension and the extension of the time-limit, in both cases an additional period of time is added to one expiration date. But, and the "special" extension of the term within the meaning of Art. 234, par. 3 of the Criminal Procedure Code shall be implemented by decision of the prosecutor or of the administrative head of the respective prosecutor's office. Then, what is the guarantee that the extensions of the pre-trial time will not be carried out systematically for the prosecution's needs and too little, or at least for those of the defense?

Fifth, the availability of time-limits for pre-trial investigation encourages public authorities to transfer the evidence-based process primarily to the judicial phase, where the judicial investigation is conducted within a reasonable, not exactly specified, time. This inevitably leads to the occurrence of a probative incompleteness, which is in some cases absolutely insurmountable to the accused, even due to the nature of the evidence itself, which can be erased, destroyed or damaged by the beginning of the judicial investigation. On the other hand, probative deficiency is a basic prerequisite for raising and introducing unjustified and unlawful charges. It fills the environment for making erroneous conclusions about the existence of the necessary and sufficient grounds for drafting and filing the indictments in court (Article 246 of the Criminal Procedure Code), as the prosecutor is deprived of "... all the evidence that could be objectively gathered and investigate in the pre-trial investigation."[8]

Sixth, according to Art. 234, par. 7 of Criminal Procedure Code, the materials gathered outside the term for pre-trial investigation can not be used, but only when the sentence is handed down. Therefore, per argumentum a contrario, they could be used in the enforcement of other judicial acts. For example, when deciding to approve a settlement agreement - Art. 382 of the Criminal Procedure Code, or in the adoption of a decision to convict the accused, by releasing him from criminal responsibility by imposing an administrative penalty - Art. 378 Criminal Procedure Code. The conclusion is that the same evidence may be admissible or inadmissible depending on the requirements of the case, or in other words there is no obstacle to surrendering the probative value of the evidence in the case - something incompatible with the philosophy underlying in the Constitution of Republic of Bulgaria and the Bulgarian Criminal Procedure Code.[9]

Seventh, literal interpretation and application of Art. 234 par. 7 of the Criminal Procedure Code raises serious gaps in the practice, for example, is it unclear, should it be disqualified from the evidence in the case of certain protocols with justification for the accused only because the compulsory means of obtaining them (certification, perquisition, search etc.) were carried out within the time limit for pre-trial investigation, but the approval of the records by the court occurred later, after its expiration? In the Criminal Procedure Code, there is no specific answer to the question

[8] Н. Манев, Развитие на реформата на наказателния процес, С., "Сиела", 2018 г., с. 103.
[9] Вж в този см., пак там., с. 102.

what happens when the pre-trial proceedings are initiated against an unknown perpetrator (Article 215 of the Criminal Procedure Code) and no action has been taken within the prescribed timeframe to investigate the crime, but after the expiry of the time a person accused of being charged with the minutes of the first investigative action against him.

Eighth, the short deadlines for the pre-trial phase of the trial encourage pre-trial authorities to "look for" at the cost of all the confessions of the accused, in order to guarantee their accusation. The extraction and use of the confessions of the accused de lege lata is facilitated by the legislator with the institute of the interrogation of the accused before a judge - Art. 222 of the Criminal Procedure Code. The adoption of this procedural figure has the following meaning: "... after confession has been reached, the accused is interrogated before a judge, and the relevant protocol is drawn up. If in the course of the judicial investigation he gives a substantially contradictory explanation, only the record of the interrogation before a judge /to which he or she is given a prior power/ ... from what has been said so far ... the interrogation before a judge in the pre-trial proceedings is an institute of investigation /inquisitorial/. It introduces a preliminary force of evidence and reabilitates the accused's confession as the queen of evidence."[10] In summary, the short deadlines for investigation, especially of a complicated criminal activity, the preliminary proceedings motivate their position by compensating the insufficient time with methods from the inquisitorial process.

Ninth, the provision of an explicit deadline for pre-trial investigation is also contrary to european standards of protection. Under Article 6 (1) of the ECHR, every person is entitled to request that his case be dealt with within a reasonable time. The requirement of reasonableness of the term in European theory and practice aims not to accelerate the criminal proceedings but to prevent uncertainty in the situation of the accused for too long[11]. In criminal cases "... the guarantee for reasonable time is valid from the moment when the person is accused wich means from the moment it is significantly affected.[12]" Therefore the guarantee time applies as early as in the pre-trial proceedings. Under the ECHR, criminal cases are not dealt with in absolute terms[13]. The reasonableness of the time-limit depends always on specific circumstances such as the complexity of the case (number of accusations against one person, number of accused persons, amount of evidence, legal complexity of the concerned issues, etc.), the applicant's behavior and the behavior of the competent administrative and judicial authorities[14]. Thus, the European legislator appealed for a criminal trial that takes into account the needs of the defendant to fully counter the indictment according to the nature and peculiarities of each individual case and not to the expense of them in pursuing a speedy resolution of criminal cases because of the very speed as a value.

Tenth, the existence of a special term for pre-trial investigation also contradicts the right to sufficient time for the preparation of the protection provided in Art. 6, item 3, letter "b" of the ECHR. Ensuring sufficient time to prepare the

[10] И. Сълов, Актуални въпроси на наказателния процес, С., "Нова звезда", 2014 г., с. 46.

[11] Харис, О' Бойл, Уробрик, Бейтс, Бъкли, Право на европейската конвенция за правата на човека., С., "Сиела", 2015 г., с. 523.

[12] Пак там.

[13] Пак там., с. 524.

[14] Pedersen and Baadsgaard v. Denmark [GC], no. 49017/99, judgment of 17 December 2004, Reports 2004-XI.

defense is designed to protect the accused from a quick trial[15]. By analyzing the case law of the Court of Human Rights, there would be no violation of Art. 6 (3) of the Convention if, within the time-limit for pre-trial investigation, the accused has sufficient time to take full account of the facts of the case, provided that his competence, his need for further training, authorization of a defense counsel, for a longer discussion meeting with a lawyer[16].

3. Conclusions

In our view, the written above is sufficient to justify the understanding that the introduction of an absolute time-limit for pre-trial investigation runs counter to both the principle of disclosure of the objective truth and the right to personal protection. Therefore, "de lege lata" in Art. 234 form Criminal Procedure Code terms is necessary to be understanded and treated as instructive and disciplining, and in no way fatal. In agreement with this conclusion, we propose 'de lege ferenda' to amend the text in line with the broader (European) requirement for a reasonable period or to build a new, more flexible, procedure for extending the time-limits for investigation in the preliminary phase. It is in the interest of the participants in the criminal proceedings that the legislator should strive for the complete elimination of the pre-trial investigation periods rather than for their extension or even less to their reduction.

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[15] *Müller and Others v. Switzerland*, 24 May 1988, § 35, Series A no. 133.

[16] Харис, О' Бойл, Уробрик, Бейтс, Бъкли, Право на европейската конвенция…, цит съч, с., 561-562: X vs Austria, Le compte vs Belgium, Samer vs Germany, Kremzow vs Austria и др.